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No.

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In the Supreme Court of the United States

October Term, 1982

C. A. MUNDT a/k/a CAROL A. MUNDT,
Petitioner,

vs.

NL INDUSTRIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

1. Where the District Court finds that the Petitioner was illegally terminated from his position with the Respondent in violation of the retaliation provisions of the Age Discrimination in Employment Act 29 U.S.C. 621 *et seq.*, and the case comes on for hearing three years from the date of termination and the District Court awards three years back pay, can the Court of Appeals vacate the award of back pay because reinstatement was not ordered?

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No.

In the Supreme Court of the United States

October Term, 1982

C. A. MUNDT a/k/a CAROL A. MUNDT,
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vs.

NL INDUSTRIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner C. A. Mundt a/k/a Carol A. Mundt respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 16, 1982.

OPINION BELOW

The opinion of the Court of Appeals is unreported and appears in the Appendix hereto. The opinions rendered by the District Court for the Northern District of Ohio, Western Division, are also unreported and also appear in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was originally entered on October 6, 1982. A substitute order was entered on November 16, 1982. A timely Petition for Rehearing and for Rehearing En Banc was denied on December 2, 1982, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code Title 29, Section 623(d); Title 29, Section 626(b); Title 29, Section 216. The statutes can be found in the Appendix at A17 *et seq.*

STATEMENT OF THE CASE

On March 19, 1980, United States District Court for the Northern District of Ohio, Western Division, sitting without a jury, returned an opinion and judgment in which it found that the Respondent NL Industries was guilty of violation of 29 U.S.C. Section 621 *et seq.* for firing the Petitioner from his position as Group Vice President in retaliation for his having filed a notice of intent to file an action against the company for age discrimination.

Because the case came on for trial exactly three years from the date that the Respondent fired the Petitioner, the District Judge awarded the Petitioner three years of back pay at the rate of $93,000.00 a year, for a total of $279,000.00.

Thereafter, the Petitioner filed an application for attorney fees and the Respondent filed a Motion to Amend

Judgment. On April 20, 1980, the District Judge issued another opinion, a copy of which is contained in the Appendix, in which he awarded attorney fees of $8,732.50, but ordered them paid from the Petitioner's recovery. He denied the Respondent's Motion to Amend Judgment.

Thereafter, the Respondent filed an appeal to the United States Court of Appeals for the Sixth Circuit in which, among other things, it argued that the Petitioner as a high level executive of the company was in a so-called "control group" and, therefore, was exempt from the protection of the Age Discrimination in Employment Act. This position had been urged below as well. The Respondent also argued in the Court of Appeals that the Petitioner should be limited to one year's salary because he had an employment contract which provided that he would be paid one year's salary if he were terminated.

The Petitioner filed a cross-appeal in which he urged that the District Court's order requiring the Petitioner to pay his own attorney fees was contrary to law and further argued that since the finding of retaliatory firing was implicitly a finding of wilful violation of the Act, the Petitioner should have been entitled to double damages or six years in back pay.

Although the Petitioner had requested reinstatement in his original Complaint[1] and in his post-trial brief,[2] the Petitioner did not take an appeal from the failure of the District Court to reinstate.

Upon plenary consideration, the United States Court of Appeals for the Sixth Circuit returned its first decision on October 6, 1982, a copy of which is contained in the Appendix. Petitioner's cross-appeal on the issue of at-

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1. The prayer attached to the First Claim for Relief, Age Discrimination, is as follows:

> WHEREFORE, plaintiff prays for the following relief:
>
> 1. An order requiring the defendant to promote plaintiff to the position of Executive Vice-President with all the perquisite attendant thereto.
>
> 2. An award of damages, including double damages for willfulness, for the difference between the compensation plaintiff would have received had he been promoted to Executive Vice-President on February 4, 1976 and his compensation otherwise.
>
> 3. For an injunction enjoining the defendant from taking any further personnel action; after reinstatement against the plaintiff because of his age, until said plaintiff reaches the age of 65 years.
>
> 4. For an award of attorney fees and court costs.

The prayer attached to the Second Claim for Relief, Retaliatory Discharge, is as follows:

> WHEREFORE, plaintiff prays for judgment on his second claim for relief as follows:
>
> 1. Payment of all salary and fringe benefits from August 2, 1976 through plaintiff's 65th birthday.
>
> 2. Double damages for willful violation.
>
> 3. Punitive damages as the court sees fit.
>
> 4. Attorney fees and court costs.

2. In his post-trial brief, filed November 27, 1979, Petitioner in recommending appropriate relief to the District Judge, wrote, at p. 21:

> The Court may order reinstatement at full pay (See p. 19 supra). If defendant doesn't want plaintiff back, as is suggested in Adam's testimony, then it should be required to pay him until his retirement age of 65, or three more years of pay.

torney fees was found to be well taken and the amount of attorney fees was added to the amount of the Judgment, thereupon reversing the District Court in this respect.

However, the Court of Appeals noted that no appeal had been taken from the denial of the request for reinstatement and for this reason found that the Petitioner was not entitled to back pay. This position had not been urged by the Respondent in its appeal to the Court of Appeals. Accordingly, the Court of Appeals seized upon language in the District Judge's Order denying Respondent's Motion for Correction of Judgment to the effect that the firing was intentional and willful and accordingly, took the one year's salary for severance pay and doubled it resulting in a reduction of the District Court's judgment from three years back pay to two years pay.

Thereafter, the Petitioner filed a Motion for Rehearing and a Motion for Rehearing En Banc. As the result of these motions, the Court of Appeals issued a substitute order on November 16, 1982 substantially the same as its earlier order but containing a notation that the "plaintiff did not seek reinstatement or back pay with respect to the position from which he was wrongfully discharged."

On December 2, 1982 the Court of Appeals issued an order indicating that the November 16, 1982 decision was in effect a granting of the Petition for Rehearing and also denied the Motion for a Rehearing En Banc. A copy of that Order is also contained in the Appendix.

The background of this dispute arises from the original hiring of the Petitioner as Group Vice President of Respondent NL Industries on April 1, 1973. He was hired at an annual compensation of $80,000.00 plus certain fringe benefits and was given a written agreement which provided:

> Also, as we agreed, in the unlikely event that N L would wish to terminate your services, we will pay you severance pay of one year's base salary. If your services are terminated or severed for any reason, N L will be relieved of any bonus payment obligation not fulfilled as of the termination of employment.

At the time Petitioner was terminated, his base salary was $93,000.00.

At the time he was hired, Petitioner was 56 years old and it was conceded that he proved to be a successful Group Vice President.

On January 30, 1976, the Respondent announced major changes in its corporate structures and created a new level of three executive vice presidents between the President and the Group Vice Presidents. Petitioner was summoned from his office at Toledo, Ohio to corporate headquarters in New York, where he met with Ray Adam, Respondent's then President and Chief Executive Officer. Adam told him that he was not going to receive the promotion but that the three new executives would be three other persons each younger than Petitioner. Adam admitted in his court testimony to telling Petitioner at that time that he (Adam) "had to go with the younger guys." Then, and on three other occasions, Adam told Mundt that his being passed over for promotion was "strictly a matter of age."

Although Mundt urged the District Court to hold that the failure to promote him was due to his age in violation of the Age Discrimination in Employment Act (ADEA) 29 U.S.C. 623 *et seq.*, the District Court in its original decision of March 19, 1980, found "that age was a consideration, but also finds that age was not the controlling factor."

Because of his dissatisfaction with this decision and being told that age was the reason, Petitioner ultimately

availed himself of his legal right to file a notice of intent to sue with the U. S. Department of Labor under the former practice. 29 U.S.C. 626(d). This was done on July 30, 1976. On August 2, 1976, Petitioner was phoned by one of the new executive vice presidents on routine business at which time Petitioner verbally notified the vice president that he had filed this notice. That same day Adam, the company's chief executive officer, phoned the Petitioner and ordered him to leave his office, which he did.

The District Court made a finding of fact that the firing of Petitioner was motivated by his filing of the notice of intention to sue and "was therefore a retaliatory firing by NL."

It awarded Mundt three years of back pay at the rate of $93,000.00 per year plus interest from the date of judgment. Reinstatement was not granted nor was any appeal taken from the denial of reinstatement. However, as indicated in footnote 2, p. 4, the Petitioner in his post-trial brief had specifically dealt with the subject of reinstatement requesting same and indicating that if the company did want to reinstate him, it could pay him his salary until retirement age. Further, in its original complaint (see footnote 1, p. 4), the plaintiff in his first claim for relief for age discrimination had requested promotion to the position of executive vice president as partial appropriate relief together with back pay and clearly requested back pay as relief in its second claim for relief for retaliation.

REASONS FOR GRANTING THE WRIT

1. The decision below has decided a federal question (proper damages under 29 U.S.C. Section 626(b)) in a way in conflict with the applicable decisions of this Court.

This Court in *Albemarle Paper Co. v. Moody* (1975), 422 U.S. 405, held that once discrimination is shown, the trial judge in a Title VII ordinarily does not have discretion to deny back pay

> It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.[14]
>
> The Courts of Appeals must maintain a consistent and principled application of the back pay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases (at p. 421-22).

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14. It is necessary, therefore, that if a district court does decline to award back pay, it carefully articulate its reasons.

We note of course, that the case at bar arises not out of Title VII but out of the Age Discrimination in Employment Act (ADEA). We believe that the view taken by this Court of the remedies provisions of ADEA gives the district court and the Court of Appeals *less* discretion in denying back pay than in Title VII cases under *Albemarle Paper*. In *Lorillard v. Pons* (1978), 434 U.S.

575, a case wherein the jury trial availability under ADEA was recognized, this Court devoted itself to an examination of the similarities and differences between the two acts:

> There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the work place—and in their substantive prohibitions . . . but in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.
>
> Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both 'legal or equitable relief' in the ADEA, but did not authorize 'legal' relief in so many words under Title VII. Compare Section 7(b), 29 U.S.C. Section 626(b), with 42 U.S.C. Section 2000(e)-5(g) (1970 ed., Supp. V). Similarly, the ADEA incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of back pay is a matter of equitable discretion, see *Albemarle Paper Co. v. Moody*, 422 U.S. at 421, 95 S. Ct. at 2373.[13]

13. Although we have held that the discretionary power to deny back pay should be used only where to do so "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," *Albemarle Paper Co. v. Moody*, 422 U.S. at 421, 95 S. Ct. 2373, we nonetheless have recognized that under Title VII some discretion exists.

Petitioner reads this language to indicate a stronger right to back pay under the ADEA than under Title VII.

Accordingly, Petitioner believes that the removal of back pay as a remedy in the case at bar by the court of appeals was contrary to law, contrary to the teachings of *Albemarle Paper* and *Lorillard*.

In arriving at its decision, the Court of Appeals seized upon the fact that the district court did not award reinstatement. As noted in the statement of facts, it is clear from the papers filed both at the commencement and the termination of the litigation that Petitioner was seeking reinstatement. When reinstatement was not granted he accepted the decision of the Court regarding damages as his full remedy and elected not to appeal the denial of reinstatement. Petitioner can see no validity within the parameters of the law's purpose, to penalize him for accepting the judgment of the district court and not demanding more, yet this is the net result of the ruling from the Court of Appeals.

The Court of Appeals' ruling is further based on a theory that if there is no reinstatement, there cannot be any back pay. Since there was a clear finding of violation of the law, which finding is not clearly erroneous, it is ironic that the petitioner should be penalized in his remedy for not being greedy.

This Court will note that the decision of the Court of Appeals contains no authority, either statutory or case, in support of its position. This is because in Petitioner's view, there is no such authority.

Although it is a district court decision, the statement contained in *Monroe v. Penn-Dixie Cement Corp.* (NDGA 1971), 335 F. Supp. 231, 235 accurately sets forth Petitioner's position:

> Such a reinstatement would stop any further damage to plaintiff. If the plaintiff does not request reinstate-

> ment after the date of judgment in this case, the plaintiff stands in the same position as if the court had reinstated plaintiff and he simultaneously quit the job for a reason having nothing to do with discrimination. Put more plainly, money damages awarded under the age discrimination act must be liquidated as of the date of judgment. If the plaintiff does not wish injunctive relief, he waives any unliquidated future rights he might have against his former employer.

The only case we have found to date wherein the specific subject is addressed (and rejected) is *Marks v. Prattco, Inc.* (5th Cir. 1979), 607 F.2d 1153, 1155:

> Appellant has cited to us no authority in this circuit to support its position that an award of back pay is improper unless reinstatement was sought by the discharged employees. Neither has appellant suggested any "special circumstances" which would make an award of back pay improper in this case.

From the record before the lower court, it is clear that the Petitioner was illegally fired in August of 1976; that this case came on for trial in August of 1979, exactly three years later; that plaintiff was not offered reinstatement during the interim but sought it at trial; that back pay for three years totals Two hundred seventy-nine thousand dollars ($279,000.00). If the district court had awarded reinstatement which it did not, the Court of Appeals could not have come up with any theory to reduce back pay. Yet the failure to award reinstatement and Petitioner's failure to appeal from that has ironically caused him to lose one year's back pay.

The conflict between the decision of the Court of Appeals and the rules of *Albemarle Paper* and *Lorillard* justifies a grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 16, 1982)

Nos. 81-3305, 81-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

C. A. MUNDT a/k/a CAROL A. MUNDT,
Plaintiff-Appellee,
Cross-Appellant,

v.

NL INDUSTRIES, INC.,
Defendant-Appellant,
Cross-Appellee.

ORDER

Before: LIVELY, *Circuit Judge;* BROWN, *Senior Circuit Judge;* and SILER,* *District Judge.*

Upon consideration, all orders heretofore entered by this court following argument are rescinded and the following order is substituted.

Plaintiff-appellee/cross-appellant Mundt brought an action in the district court under the Age Discrimination

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*The Honorable Eugene E. Siler, Jr., United States District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* Plaintiff, a former vice-President of the defendant-appellant/cross-appellee NL Industries, Inc., alleged that he was denied promotion by defendant solely on the basis of age. Plaintiff further alleged that the defendant company terminated his employment in retaliation for his having exercised his right to file a notice of intent to bring an action for age discrimination with the Secretary of Labor, in violation of 29 U.S.C. § 623(d). Plaintiff appended a state law cause of action for breach of an employment contract which specified the payment of one year's base salary ($93,000.00) in the event of termination.

Following a non-jury trial on the merits, the district judge held that the failure to promote plaintiff was not a violation of the Act but that the discharge of plaintiff was a violation in that it was in retaliation for his initiating the charge of discrimination.

The district judge awarded plaintiff as damages a judgment of $279,000.00 and determined his attorney's fee to be $8,732.50 to be paid by plaintiff out of his recovery.

Defendant has appealed the award of the recovery and plaintiff has appealed the award only insofar as it provides that his attorney's fee is to be paid out of the recovery. Plaintiff did not appeal the determination that the failure to promote was not a violation of the Act.

Defendant contended, among other things, that Mundt was not protected by the Age Discrimination in Employment Act because, as a group vice-president, he was "a control - group executive." This contention is overruled because there is no authority to support it and, in view of the purpose of the statute, it has no basis in reason.

We find that the determination by the district court that plaintiff's discharge was a violation of the Act is supported by substantial evidence.

The orders of the district court are unclear in that the recovery at one point is referred to as "back pay" and yet at another point the recovery is referred to as an amount to include $93,000.00 for one year as provided by the termination provision in the employment contract and increased by $186,000.00 for two additional years "for the retaliatory discharge."

It appears to us that a "back pay" award would be inappropriate since plaintiff did not seek reinstatement or back pay with respect to the position from which he was wrongfully discharged. On the other hand, it appears that, since the district judge found a willful violation of the Act in the discharge of plaintiff, which finding is supported by substantial evidence, plaintiff was entitled to recover $93,000.00 as per the termination provision in his employment contract which should be doubled to allow for a recovery as liquidated damages (29 U.S.C. § 626(b)), making a recovery of $186,000.00. In addition, plaintiff is entitled to recover attorney's fees of $8,732.50 (29 U.S.C. § 626(b)). Thus, plaintiff is entitled to recover a total judgment in the amount of $194,732.50 with interest to run from date of original judgment.

It is therefore ORDERED that the judgment of the district court is vacated and the cause is remanded for entry of a judgment consistent with this Order.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AMENDING ORDER FILED OCTOBER 6, 1982

(Filed November 9, 1982)

Nos. 81-3305, 81-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

C. A. MUNDT a/k/a
CAROL A. MUNDT,
Plaintiff-Appellee,
Cross-Appellant,

v.

NL INDUSTRIES, INC.,
Defendant-Appellant,
Cross-Appellee.

ORDER AMENDING ORDER FILED OCTOBER 6, 1982

Before: LIVELY, *Circuit Judge;* BROWN, *Senior Circuit Judge;* and SILER,* *District Judge.*

Plaintiff-appellee, C. A. Mundt, has filed a petition for rehearing with suggestion for rehearing en banc of this court's order entered October 6, 1982. Among the errors alleged in the petition is that this court's order vacating the district court's judgment and remanding for entry

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*Honorable Eugene E. Siler, Jr., United States District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

of a judgment in lesser amount does not provide that interest should run on said lesser amount from the date of the original judgment.

Upon consideration, the panel has determined that Mundt is correct in this contention and that interest should run from the date of the original judgment entered on March 19, 1980.

Accordingly, it is ORDERED that this court's order entered October 6, 1982 be and the same is hereby amended to add the following sentence at the end of the next to last paragraph on page 3 of said order:

"Interest on said judgment will run from the date of entry in the district court of the original judgment, March 19, 1980."

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 6, 1982)

Nos. 81-3305, 81-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

C. A. MUNDT a/k/a
CAROL A. MUNDT,
Plaintiff-Appellee,
Cross-Appellant,

v.

NL INDUSTRIES, INC.,
Defendant-Appellant,
Cross-Appellee.

ORDER

Before: LIVELY, *Circuit Judge;* BROWN, *Senior Circuit Judge;* and SILER,* *District Judge.*

Plaintiff-appellee-cross-appellant Mundt brought an action in the district court under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* Plaintiff, a former Vice-President of the defendant-appellant-cross-appellee NL Industries, Inc., alleged that

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*Honorable Eugene E. Siler, Jr. U. S. District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

he was denied promotion by defendant solely on the basis of age. Plaintiff further alleged that the defendant company terminated his employment in retaliation for his having exercised his right to file a notice of intent to bring an action for age discrimination with the Secretary of Labor, in violation of 29 U.S.C. § 623(d). Plaintiff appended a state law cause of action for breach of an employment contract which specified the payment of one year's base salary ($93,000.00) in the event of termination.

Following a non-jury trial on the merits, the district judge held that the failure to promote plaintiff was not a violation of the Act but that the discharge of plaintiff was a violation in that it was in retaliation for his initiating the charge of discrimination.

The district judge awarded plaintiff as damages a judgment of $279,000.00 and determined his attorney's fee to be $8,732.50 to be paid by plaintiff out of his recovery.

Defendant has appealed the award of the recovery and plaintiff has appealed the award only insofar as it provides that his attorney's fee is to be paid out of the recovery. Plaintiff did not appeal the determination that the failure to promote was not a violation of the Act.

We find that the determination by the district court that plaintiff's discharge was a violation of the Act is supported by substantial evidence.

The orders of the district court are unclear in that the recovery at one point is referred to as "back pay" and yet at another point the recovery is referred to as an amount to include $93,000.00 for one year as provided by the termination provision in the employment contract and increased by $186,000.00 for two additional years "for the retaliatory discharge."

It appears to us that a "back pay" award would be inappropriate since plaintiff was not reinstated and there was no appeal of the denial of reinstatement even if such was actually sought. On the other hand, it appears that, since the district judge found a willful violation of the Act in the discharge of plaintiff, which finding is supported by substantial evidence, plaintiff was entitled to recover $93,000.00 as per the termination provision in his employment contract which should be doubled to allow for a recovery as liquidated damages (29 U.S.C. § 626(b)), making a recovery of $186,000.00. In addition, plaintiff is entitled to recover attorney's fees of $8,732.50 (29 U.S.C. § 626(b)). Thus plaintiff is entitled to recover a total judgment in the amount of $194,732.50.

It is therefore ORDERED that the judgment of the district court is vacated and the cause is remanded for entry of a judgment consistent with this Order.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed March 19, 1980)

No. C-76-519

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

C. A. MUNDT, etc.,
Plaintiff,

vs.

NL INDUSTRIES, INC.,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WALINSKI, *J*:

This cause came on for trial to the Court August 6 and 7, 1979. Plaintiff requested time after the filing of a transcript to submit a post-trial brief. Both parties have filed post-trial memoranda, and the matter is now decisional.

This cause was brought under the Age Discrimination in Employment Act (hereinafter ADEA), alleging discrimination in failing to promote and finally terminating plaintiff's employment. Plaintiff appends a state law cause of action for breach of an employment contract specifying the payment of one year's salary ($93,000.00) in the event of termination. The Court will exercise pendent jurisdiction over this state law claim.

FINDINGS OF FACT

This Court has jurisdiction under the ADEA as amended, 29 U.S.C. § 621 *et seq.*

Plaintiff was hired by the Defendant NL Industries, Inc. (hereinafter NL) at age 56-1/2 years from another high-level corporate executive position. Plaintiff's experience is well set out in his post-trial memorandum and need not be repeated here.

In early 1976, three executive vice-presidents were appointed by Ray Adam, all three younger than plaintiff. When plaintiff inquired about his passover, he was told that NL "had to go with the younger guys" on several occasions. The Court has no hesitancy in finding that age was a consideration, but also finds that age was not the controlling factor.

In governing a multi-unit corporate conglomerate, the president and directors have to consider many facets of personnel in high level executive positions—not the least of these is future service to assure continuity.

The Court therefore finds that the failure to promote plaintiff was not discriminatorily age oriented so as to violate the provisions of the ADEA.

Plaintiff thereafter filed with the Secretary of Labor a letter of intent to bring suit. Pursuant to law, the Secretary notified the Defendant NL of the filing and attempted a conciliation which failed.

Upon Adam's being notified of the filing of the intent to sue letter, he called plaintiff and expressed shock and dismay and told plaintiff to leave the premises, among other things. Plaintiff notified his co-workers that he was taking an extended vacation. NL, through Adam, then

took the position that plaintiff terminated his employment and terminated his employment contract.

The Court has no hesitancy in finding that the constructive termination by NL was motivated by the plaintiff's filing of his statute-empowered right to file an age discrimination claim, and was therefore a retaliatory firing by NL.

The finding above likewise disposes of the plaintiff's state law breach of contract claim. Having terminated the plaintiff's employment, by contract NL was obligated to pay at least $93,000.00 to plaintiff.

The Court finds that the retaliatory firing entitles plaintiff to three years' back pay in the sum of $279,000.00. Since that award encompasses the year's salary provided by contract, the Court deems the sum merged into the principal award.

Detailed facts leading to the above conclusions are set out in the parties' memoranda, depositions, the evidence, and transcript, and will not be repeated here.

CONCLUSIONS OF LAW

This Court has jurisdiction under the ADEA, 29 U.S.C. § 621 *et seq.*, and pendent jurisdiction over Count III of the complaint.

The Court finds that although age may have been a factor in plaintiff's non-promotion, in the complex matter of choosing a high-level executive, age would have to be the main controlling factor before the ADEA would come into play.

29 U.S.C. § 623, provides, *inter alia*:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's age;

* * * *

(d) it shall be unlawful of an employer to discriminate against *any of his employees* * * * because such individual * * * has opposed any practice made unlawful by this section, or because such individual * * * has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this chapter. (*Emphasis added.*)

The termination for exercising the rights granted by § 623(d) above was retaliatory and a violation of the ADEA.

The ADEA incorporates the remedies provision of §§ 16 (except for subsection (a) thereof) and 17 of the Fair Labor Standards Act (hereinafter FLSA), 29 U.S.C. § 626(b). The FLSA sections are 29 U.S.C. §§ 216 and 217. 29 U.S.C. § 216(b) also provides:

(1) Amounts owing as a result of a violation of ADEA shall be deemed to be "unpaid minimum wages or unpaid overtime compensation" under FLSA;

(2) The courts are vested with jurisdiction to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of (the Act), including without limitation judgments compelling employment, reinstatement or probation, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation * * *"; and

(2) Liquidated damages shall be payable "only in cases of willful violations." Liquidated damages are defined as an amount equal to the amount of unpaid minimum wages or unpaid overtime compensations.

Plaintiff is entitled to back pay at the rate of Ninety-Three Thousand Dollars ($93,000.00) per year, his base salary at the time of termination. The trial was exactly three years from the date of termination, so plaintiff's back pay is 3 x $93,000 Two Hundred Seventy-nine Thousand Dollars ($279,000.00).

Accordingly, the Court finds for the plaintiff and against the Defendant NL and awards judgment for damages in the sum of $279,000.00 and the costs of suit.

IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKI
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed April 20, 1981)

No. C 76-519

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

C. A. MUNDT, etc.,
Plaintiff,

vs.

NL INDUSTRIES, INC.,
Defendant.

ORDER

This cause is before the Court on defendant's motion to amend this Court's judgment as to damages awarded, and plaintiff's motion for an award of attorney fees, and oppositions thereto.

The defendant contests the finding by this Court that pursuant to the terms of plaintiff's employment contract, the plaintiff was entitled to $93,000 as severance pay, and an award of $186,000 for the willful and intentional violation of the Age Discrimination in Employment Act (ADEA).

Plaintiff was passed over for promotion solely because of his being older than other eligible corporate officers. When a discrimination complaint was filed by plaintiff, he was promptly terminated. The Court found that to be a retaliatory discharge prohibited by the ADEA.

Plaintiff's employment contract specifically provided a year's salary, $93,000, for termination for any reason. To that provision, the Court, exercising its discretion, awarded an equal amount for each of the two additional years from discharge to trial for the retaliatory discharge prohibited by the ADEA.

The intangible damages occurring in a discriminatory discharge and a violation of statutory rights are difficult to calculate. The Court used the employment contract as the base for its conclusion.

The Court finds the motion to amend not well taken. The various continuances that delayed pretrial were generated by the plaintiff, defendant, and the Court in the usual course of bringing this matter to trial.

The Court has created a fund in this litigation that was substantial. Accordingly,

IT IS ORDERED that the Court will award attorney fees to plaintiff's counsel in the sum of $8,732.50, to be paid out of the fund created by the Court, the balance to be paid to plaintiff.

IT IS FURTHER ORDERED that the motion to amend is not well taken.

/s/ NICHOLAS J. WALINSKI
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON PETITION FOR REHEARING

(Filed December 2, 1982)

Nos. 81-3305, 81-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

C. A. MUNDT a/k/a CAROL A. MUNDT,
Plaintiff-Appellee,
Cross-Appellant,

v.

NL INDUSTRIES, INC.,
Defendant-Appellant,
Cross-Appellee.

ORDER

Before: LIVELY, *Circuit Judge*; BROWN, *Senior Circuit Judge*; and SILER,* *District Judge.*

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled cases; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

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*The Honorable Eugene E. Siler, Jr., United States District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

Upon consideration, plaintiff-appellee/cross appellant Mundt's petition to rehear is granted and, pursuant thereto, the substitute order of November 16, 1982, has been entered.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

STATUTES INVOLVED

29 U.S.C. § 216

§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may

be appropriate to effectuate the purposes of section 215 (a) (3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon pay-

ment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did

not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a) (3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5 and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

29 U.S.C. § 623

§ 623. Prohibition of age discrimination
Employer practices

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Employment agency practices

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

Labor organization practices

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Opposition to unlawful practices; participation in investigations, proceedings, or litigation

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant

for membership has opposed any practice made unlawful by this section or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Printing or publication of notice or advertisement indicating preference, limitation, etc.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

Lawful practices; age as occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter,

except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

29 U.S.C. § 626

§ 626. Recordkeeping, investigation, and enforcement

Attendance of witnesses; investigations, inspections, records, and homework regulations

(a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensa-

tion for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Same; filing of charge with Secretary; timeliness; conciliation, conference, and persuasion

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 623(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Statute of limitations; reliance in future on administrative rulings, etc.; tolling

(e)(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.